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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-715, Advocate Christ Medical Center versus Becerra. Ms. Sherry.

ORAL ARGUMENT OF MELISSA ARBUS SHERRY
ON BEHALF OF THE PETITIONERS

MS. SHERRY: Mr. Chief Justice, and may it please the Court:

The same words in the same sentence should have the same meaning. Today, we are talking about the words "entitled to benefits" in the DSH adjustment. Just two terms ago, in Empire Health, this Court looked at the words "entitled to benefits under Medicare Part A" and said that it means qualifying for the Medicare Part A program.

"Entitled to SSI benefits" in the same sentence should mean the same thing, qualifying for the SSI program. A person qualifies for the SSI program when she applies and is determined eligible, and that eligibility lasts until it is terminated. The government disagrees because it says that there's no such thing as an SSI

1 program and the only SSI benefit is a monthly
2 cash payment.

3 But Congress created what it called a
4 national program, and it created a program of
5 income insurance. This is a program where a
6 person who's low income enough to qualify in the
7 first place is promised a minimum guaranteed
8 income for a calendar year, and in the months
9 where that income is not needed, the cash
10 payment is suspended. Nothing is terminated,
11 and other benefits remain available.

12 In the end, this is about DSH, and DSH
13 is about ensuring that hospitals are reimbursed
14 for low-income patients that are less healthy
15 and that are costlier to treat, and health does
16 not change overnight.

17 The government's interpretation simply
18 does not count that low-income population. It
19 does not count the low-income Medicaid patient
20 coming out of a nursing home. It does not count
21 the low-income patient waiting for her first
22 check. And the list of those it does not count
23 goes on and on. A DSH proxy that does not
24 measure the low-income population is no proxy at
25 all.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Are there other
3 benefits other than cash under -- under, what is
4 it, Title XVI?

5 MS. SHERRY: There are. There are
6 non-cash benefits, including Medicaid
7 continuation, and you can find that in 1382h(b),
8 and there's also vocational rehabilitation,
9 which you can find in Title XVI under 1382d.

10 You know, the government's response to
11 that, I think, is twofold. It's to say that
12 non-cash is not income but probably more so to
13 say that those aren't benefits under Title XVI.

14 But they're both housed in Title XVI.
15 They're both triggered by being program-eligible
16 under Title XVI. And especially when it comes
17 to Medicaid continuation, it's referred to as a
18 benefit under 1382h, which is in Title XVI.

19 The --

20 JUSTICE SOTOMAYOR: Could you clarify
21 for me the Medicare -- the Medicaid regulation
22 that the government relies -- relies on? It's
23 some -- it has something to do with, if
24 someone's on Medicaid, if they receive more than
25 \$30 a month in income, they're no longer

1 eligible for SSI?

2 MS. SHERRY: Yeah. So -- so this
3 comes out of the SSI statute, and it makes sense
4 when you're thinking of -- of SSI. So the
5 reasoning behind it is that while you're in a
6 facility where Medicaid is paying for your daily
7 needs, you don't need the full payment.
8 Instead, you'll get this \$30 comfort payment but
9 only if your income is actually under \$30. And
10 for most people, because you get a Social
11 Security check, that's not going to be the case.

12 And I think that's one of the most
13 significant problems with the government's
14 approach, is it doesn't count any of those
15 individuals as low income for purposes of the
16 Medicare fraction. And it's really significant
17 because we have two different fractions here,
18 right? One measures low income based on SSI.
19 The other one measures it based on Medicaid
20 eligibility.

21 And so these are people that are, by
22 definition, Medicaid-eligible and so low income
23 when you think about the Medicaid fraction, yet
24 because of the way they do the calculation here,
25 they're actually not counted in either fraction.

1 I think, in Empire --

2 JUSTICE SOTOMAYOR: Now I -- I am a
3 little concerned about the Medicaid situation
4 because, as I understand it, when people are
5 placed in nursing homes, they assign all of
6 their income to the nursing home, and Medicaid
7 then picks up whatever the difference is between
8 that income and whatever the -- the authorized
9 charge is.

10 So, by the government counting the SSI
11 as income to the patient, they're ignoring that
12 the patient is only seeing about \$30 a month.

13 MS. SHERRY: Yeah, and -- and I think
14 even less than that. I mean, I think the real
15 problem with the government's approach is that
16 person, in -- in the terms of the -- the
17 regulations, is thought of to be eligible for
18 SSI but not payable, and those individuals just
19 aren't counted at all for DSH purposes.

20 And so I think there was an assumption
21 in Empire Health that low-income individuals
22 would be in one fraction or the other, one box
23 or the other, but this takes these individuals
24 who are indisputably low income in their
25 hospital month and it doesn't count them at all.

1 And I think this is one of the places
2 where the government's arguments confuse the
3 purposes of the SSI statute and the purposes of
4 DSH. And so, you know, maybe there's a good
5 reason why they don't get a check, maybe there's
6 not, as Your Honor pointed out. But whatever
7 the answer to that question is, it's specific to
8 SSI. For DSH, there's absolutely no reason why
9 they shouldn't be counted as low income for
10 purposes of figuring out the hospital's
11 reimbursement.

12 JUSTICE SOTOMAYOR: Thank you,
13 counsel.

14 JUSTICE BARRETT: Ms. Sherry, am I
15 correct -- I just want to clarify that you're
16 not challenging any of the specific codes,
17 because people fall out for different reasons,
18 you know, wrong address and all of that, some of
19 the S codes?

20 MS. SHERRY: Yes.

21 JUSTICE BARRETT: But you're not
22 challenging any of those, and the D.C. Circuit
23 held that those challenges were waived?

24 MS. SHERRY: So -- so I think what was
25 going on in the D.C. Circuit was really

1 challenges to what kind of happens behind the
2 curtains as far as the counting goes. The
3 challenge that we have is just to what the
4 interpretation of the language should be. And,
5 under our interpretation, all of those codes
6 would be counted because our view of it is that
7 it's about program eligibility and someone is --

8 JUSTICE BARRETT: But, if you lose,
9 which let's just assume --

10 MS. SHERRY: Yes.

11 JUSTICE BARRETT: -- if you -- if you
12 lost, it's still possible for you in other
13 litigation, if -- even if not on remand, if it's
14 waived, to challenge particular codes?

15 MS. SHERRY: I think it depends. I
16 mean, I think the government's view -- if the
17 government's interpretation prevails here, I
18 think all of those codes would be out because
19 the government is -- is defending what -- or I
20 think defending, although maybe ask them, but I
21 think defending what CMS is doing, which is only
22 counting three codes. And that's at pages 47
23 and 48 of their brief. And so, if -- if their
24 interpretation prevails, they will continue to
25 just count the three codes.

1 And you can imagine litigation about
2 whether they're doing that correctly, and there
3 has been litigation, you know, with respect to
4 that, but as far as our differing interpretation
5 goes, I think we're at two different extremes.

6 JUSTICE BARRETT: Because it seems to
7 me like if you're eligible for a monthly payment
8 because your income was low enough, but you
9 didn't get the check because -- for all of the
10 various administrative reasons why you might not
11 get it, I could imagine you satisfying the
12 statutory definition even under the government's
13 approach but yet still be entitled to a check
14 that somehow the codes don't account for.

15 MS. SHERRY: Yeah. So I -- I'm
16 curious as to what the government's view are. I
17 -- I can say that CMS is not counting those
18 individuals, right, because they're only
19 counting the three codes, and I think they're
20 basing it -- we call it an actual receipt rule.
21 Maybe it's an actually sent rule. But they're
22 only counting those for which a payment has been
23 sent by the time they do the matching process,
24 so 15 months after.

25 And anyone who doesn't have one of

1 those three codes at the time, which would
2 include all the individuals you're talking
3 about, just wouldn't be counted.

4 But I don't think you can just draw
5 the line at those individuals because there's a
6 second category, including the nursing home
7 patients, who are still eligible. They're just
8 not payment-eligible in a particular month.
9 They're not due a payment in that month. And
10 the government, I think, admits that all of
11 those individuals fall out under their approach
12 too.

13 It includes those in their first month
14 of eligibility. So they just went through the
15 application process and were found to be low
16 income, yet they're not entitled to a check
17 their very first month. Those individuals would
18 not be counted.

19 Also in the other category, there's
20 individuals who are in prison, who also aren't
21 counted because they're not due a check. That
22 might make a lot of sense when it comes to SSI.
23 It doesn't make any sense when it comes to DSH
24 because the individuals who are low income who
25 are in prison certainly aren't getting any

1 healthier when they're transferred to a
2 hospital.

3 JUSTICE JACKSON: So, as a textual
4 matter, you seem to be distinguishing program
5 eligibility, as you say, and eligibility for a
6 payment, and I'm just wondering whether that's
7 pretty common.

8 I mean, I sort of conceive of other
9 benefits programs in the federal scheme in a
10 similar way. I sort of thought that's what we
11 were saying in Empire, that you could have
12 Medicare where you have criteria for program
13 eligibility, but just because you don't get the
14 benefit doesn't mean that you don't qualify for
15 the DSH fraction. Is that sort of how your
16 argument works?

17 MS. SHERRY: It is, right. There's a
18 difference between whether you have a right to
19 payment at a -- at a particular time or for a
20 particular service and whether you are in the
21 program, whether you are entitled to benefits
22 under the program.

23 And we're making the same distinction
24 here that the Court made in Empire Health in
25 that respect. And I think you could look -- I

1 mean, in terms of the actual textual language,
2 you can look at a few provisions.

3 The most notable one in the SSI
4 statute we point out in our brief, it's in -- on
5 pages 60 -- sorry, 34A and 35A of the statutory
6 addendum, and it's this financial records
7 provision, and it basically says: You authorize
8 us to access your financial records, and that
9 authorization lasts until cessation of your
10 eligibility for benefits under Title XVI.

11 And the government agrees that that
12 has to mean program eligibility because,
13 otherwise, it would be a very nonsensical system
14 to have to get reauthorization every single
15 month. And the regulations confirm that because
16 they say that the authorization is valid until
17 there has been a terminating event.

18 JUSTICE JACKSON: And so your argument
19 just in terms of the purposes, because you
20 brought that up before, is that you view DSH as
21 trying to get at those people that --

22 MS. SHERRY: Trying to get at the
23 larger group of individuals.

24 JUSTICE JACKSON: The larger group of
25 program eligibility because it doesn't, in your

1 view, make any sense that whether or not a
2 person gets a payment is -- has some sort of
3 relationship to the DSH fraction?

4 MS. SHERRY: That's exactly right.
5 And if you look, actually, at the legislative
6 history for DSH in the Senate report and in the
7 conference report, where they're talking about
8 the Senate bill, the language is the same there
9 as it is now when it comes to SSI at least.

10 And for that language, they describe
11 it as wanting to count those who are enrolled in
12 the SSI program, so both acknowledging that
13 there is a program and focusing on the class of
14 enrollees.

15 And I think that is most consistent
16 with the DSH purpose, but I think it's also most
17 consistent with the text of DSH, which talks
18 about "entitled to benefits," plural, and also
19 excludes one particular benefit, which is state
20 supplementation.

21 So it's a broad definition, but it's
22 also a nuanced one that would include everything
23 else that is not excluded, which includes the
24 cash benefits but also includes things like
25 Medicaid continuation and also vocational

1 rehabilitation. Both are within Title XVI.

2 JUSTICE KAGAN: Can I step back a
3 minute, Ms. Sherry, and just ask you about the
4 nature of your argument? Because you start both
5 in the briefs and then again this morning, you
6 know, by saying "entitled to benefits" can't
7 mean the same thing when it's used twice in
8 one -- can't mean different things when it's
9 used twice in one sentence.

10 But, of course, this is "entitled to
11 benefits under Medicare" and "entitled to
12 benefits under SSI." And -- and Empire was all
13 about what "entitled to benefits under the
14 Medicare program" meant. I mean, it did a sort
15 of micro-analysis of the Medicare statute and
16 its structure and its purposes and its text.

17 So, if we thought that the SSI program
18 was completely different, if we thought that --
19 and I know your argument is that it's not --
20 but, if we thought that, this argument about the
21 language can't mean different things in the same
22 sentence would completely go away, isn't that
23 correct?

24 MS. SHERRY: Partially.

25 So I want to clarify. We think you

1 have to start with the DSH statute, and we think
2 you have to start with Empire, but that's not to
3 say you shouldn't look to the SSI statute. You
4 need to do that to determine whether someone
5 qualifies for a program.

6 Now, as far as what "entitle" means, I
7 do think there would still be an oddity in terms
8 of saying "entitled" does not mean right to
9 payment, it means eligible in one part, then
10 "entitled" means right to payment, it doesn't
11 mean eligible, and then you get down to
12 "eligible" and you say it doesn't mean right to
13 payment, it means the same as the first
14 "entitled" but not the second "entitled."

15 So I do think that would be a
16 complicated thing to do.

17 JUSTICE KAGAN: Well, I -- I guess the
18 question, though, is, you know, what it means to
19 be entitled to benefits under either program.
20 And if you thought what it meant is -- is very
21 different to -- you know, that "entitled to
22 benefits under Medicare" was very different from
23 "entitled to benefits under SSI" or, similarly,
24 that "eligibility for benefits under Medicare"
25 was very different from "eligibility for

1 benefits under SSI," then that's the way you
2 would read the statute, correct?

3 MS. SHERRY: I -- I think that's true
4 if you focus on -- on benefits. And the only
5 thing I'm pushing back on -- I would agree with
6 you. I mean, if you took "entitled to" and you
7 ran it through the SSI statute and it became
8 clear it's a term of art, it always means right
9 to payment, you would, you know, probably
10 overcome the presumption and read it back in.

11 But "entitled to" is not a term of art
12 in the SSI statute. It's rarely used. And so
13 that doesn't work.

14 JUSTICE KAGAN: I mean, just to put
15 this --

16 MS. SHERRY: But then the other --

17 JUSTICE KAGAN: -- at its most
18 starkest form, you know, suppose -- and I -- I
19 know that you vigorously resist this, and -- and
20 I'm not suggesting the -- I'm just -- let's just
21 assume for a second that SSI was, like, not an
22 insurance program of the kind that Medicare is,
23 nor is it a program that gives you a panoply of
24 benefits but that, instead, it was simply a -- a
25 cash subsidy that is given on a month-to-month

1 basis. Let's just say that. And I know you
2 have a thousand objections to that.

3 But, I mean, then you would say:
4 Well, you know, then the government has to be
5 right, notwithstanding that it's "entitled to,"
6 "entitled to" in the statute.

7 MS. SHERRY: Right. That would be a
8 different case because you would say, when you
9 qualify for the SSI benefits, it is limited just
10 to that monthly right to payment.

11 I mean, if it was just people off the
12 street, right, there's no program, there's no
13 application process, just every month you call
14 up, say, I checked these three boxes, give me a
15 check, the next month you call up again, and
16 there's no application process, there's no
17 program, there's no other benefits, yes, it
18 would be completely not okay.

19 JUSTICE KAGAN: Yeah.

20 JUSTICE KAVANAUGH: The --

21 JUSTICE KAGAN: So it's just that, you
22 know, just to put it in its starkest form, in
23 the end, this is a question about the nature of
24 SSI, right? If you're right, you win. If the
25 government is right, the government wins. In

1 the sense of is SSI a program that gives you
2 lots of different kinds of benefits once you
3 qualify for it, one might go away, but you
4 retain the others, or is SSI just a monthly
5 check that you get in the mail?

6 MS. SHERRY: I think that is a key
7 part of the analysis. I would hesitate to say
8 it's everything because I think you still have
9 to come back to the text of DSH, and I think you
10 still have to come back to the purpose of DSH.

11 JUSTICE KAVANAUGH: And --

12 MS. SHERRY: And so --

13 JUSTICE ALITO: Well, your --

14 JUSTICE KAVANAUGH: -- so how -- go
15 ahead. Go ahead.

16 JUSTICE ALITO: I mean -- I mean, your
17 lead argument is -- and it's -- you know, it's
18 catchy when you read it -- that the phrase
19 "entitled" -- "entitled to benefits" can't mean
20 two things.

21 But following up on what Justice Kagan
22 was asking, I don't see how the government's
23 argument does that at all. What you're saying
24 seems to me, when you think about it, terribly
25 superficial. It's the nature of the

1 entitlement.

2 So "entitled to benefits" can mean
3 exactly the same thing in these two contexts,
4 but it -- you know, "entitle" -- it's the nature
5 of the entitlement. So, if the entitlement is
6 different under Medicare and under SSI, then
7 that argument falls apart.

8 MS. SHERRY: So I think there's two
9 ways to look at the government's argument. One
10 is it's interpreting "entitled" to mean two
11 different things. I think, during the Empire
12 Health argument, that was a concern. It was
13 Problem 1 with the government's interpretation
14 there.

15 But I think, even if you don't read it
16 that way and you read it as focusing just on the
17 qualifications for the program and SSI being
18 different, it doesn't hold up on that ground
19 either.

20 So you can take, you know, everything
21 about the same word meaning the same thing and
22 put it to the side and just focus on the SSI
23 statute, and it doesn't look different in any
24 way that matters to then Medicare Part A.

25 JUSTICE ALITO: Okay. So we get -- we

1 get to those arguments.

2 Now another argument that you have is
3 that this is like Empire Health. But isn't
4 Medicare different from SSI in at least two very
5 important effect -- respects that Empire Health
6 emphasized? SSI payments are not automatic and
7 they're not enduring. Isn't that -- that true?
8 And that is not true of Medicare?

9 MS. SHERRY: They -- there are
10 differences, but the differences, I think,
11 actually, as far as it not being automatic point
12 in our direction.

13 So, yes, you need to apply to be
14 entitled to SSI benefits, but I think that helps
15 our interpretations because, basically, there
16 are application bookends on either side that
17 show that there is a program that you are
18 eligible for.

19 And so the difference here is Medicare
20 Part A, you're automatically entitled. Here,
21 you have to apply. But, once you apply, then
22 we're in the same world. Then you are entitled
23 to SSI benefits and you're entitled to them
24 until you've been terminated from the program.

25 The statute distinguishes between

1 suspensions and terminations, and the
2 regulations do the same thing. Part -- subpart
3 (m) of the regulations separate out suspensions
4 from terminations, and you can't be suspended
5 unless there's something to be suspended from.

6 And so I think the application
7 distinction works in our favor.

8 JUSTICE KAVANAUGH: The -- keep going.
9 Sorry.

10 MS. SHERRY: Oh, no.

11 JUSTICE KAVANAUGH: Well, I think the
12 question from both Justice Kagan and Justice
13 Alito, at least as I understand them, is --
14 boils down to is SSI similar in relevant
15 respects to Medicare for purposes of
16 interpreting this statutory provision.

17 And I think the government emphasizes
18 two things, maybe more. One, that Medicare's an
19 insurance program and SSI, they say, is not.
20 And, two, at least the big picture that I
21 understand, people drop in and out of SSI more
22 readily than they do on Medicare. And I think
23 how we analyze those two questions determines
24 how similar SSI is to Medicare at least as I
25 understand it. So I want you to focus on the

1 insurance description and the falling in and out
2 as distinct from Medicare.

3 MS. SHERRY: Sure. So, on the
4 insurance distinction, this is -- you know, it's
5 not health insurance, obviously, but it's income
6 insurance. It's not just this monthly payment
7 to strangers on the street. The whole concept
8 --

9 JUSTICE KAVANAUGH: What do you mean
10 by the word -- I'm going to ask the government
11 this too -- what do you mean by the word
12 "insurance"?

13 MS. SHERRY: Almost assurance. So --
14 so the -- the concept here is that you're
15 guaranteed a minimum income for the calendar
16 year once you're part of the program, once
17 you've applied and been accepted.

18 I think of it as if, you know, you
19 have a college graduate whose parents say
20 congratulations, go get yourself an apartment,
21 and we will send you a rent check for every
22 month in which you don't have enough money to
23 cover rent. And so, if you have a job and
24 you're making money and you can cover it, you're
25 on your own, but if you come up short, we'll

1 cover the difference, and we'll do that until
2 you've been able to string together 12 months
3 where you've been able to pay for your own rent,
4 at which point deal's off, you're on your own.

5 That's really what the SSI program is.
6 So it's not just the cash payment in a given
7 month or making up the difference. It's knowing
8 that you're guaranteed this minimum income for
9 as long as you're in the program.

10 JUSTICE KAVANAUGH: And then the --
11 the dropping out, I think one of the
12 government's suggestions is you can drop out of
13 SSI more readily and somehow that, for purposes
14 of the questions Justice Kagan and Justice Alito
15 were asking, makes SSI relevantly different.

16 MS. SHERRY: Right. So I don't think
17 that's a distinction either. I'm not sure, even
18 if it were, it would matter, but I don't think
19 it's a distinction because there's two kinds of
20 eligibility and it depends what the government
21 is talking about.

22 There's program eligibility, and
23 individuals do not drop out of the program all
24 that often. I think the -- the statistics the
25 government give -- and it's in the Joint

1 Appendix from the court of appeals; it's at page
2 147 -- is that about 350,000 people in -- I
3 think it's in 2009 were terminated for excess
4 income.

5 First of all, that's about 5 percent
6 of the population. But, if you look more
7 closely at those who are likely to be
8 Medicare-eligible, so over the age of 65, and
9 that's at the bottom of that page, it's roughly
10 about 35,000 people total who drop out. The
11 reality is most stay in this program for a long
12 time, and so I think it's actually quite stable.

13 JUSTICE KAVANAUGH: Do people drop out
14 of Medicare --

15 MS. SHERRY: I think people drop out
16 --

17 JUSTICE KAVANAUGH: -- when --

18 MS. SHERRY: -- when they're no longer
19 disabled --

20 JUSTICE KAVANAUGH: Correct.

21 MS. SHERRY: -- would be the primary
22 example.

23 JUSTICE KAVANAUGH: Yeah.

24 MS. SHERRY: And so I -- I think, you
25 know, once you get down to it, it's pretty

1 comparable. And then, if you look at payment
2 eligibility in terms of, like, the
3 month-to-month payments, in Empire Health, it
4 was recognized that people might not get payment
5 for particular services because they've exceeded
6 the 90 days, for example, or because a primary
7 payor is paying. So there's some lack of
8 stability when it comes to payment for Medicare
9 Part A.

10 And then you translate that over to
11 SSI and they again point to statistics -- and
12 this is the prior page, 146, of the Joint
13 Appendix from the court of appeals -- and that
14 number is higher. It's about 600 -- I think
15 650,000 individuals in 2009 who were suspended
16 for excess income. But, again, if you focus on
17 the over-65 number, it's about 71,000 people.

18 And so, even when it comes to payment
19 eligibility, it's not nearly as variable as they
20 suggest it is.

21 JUSTICE GORSUCH: Ms. Sherry, if we
22 might take a hypothetical. Let -- let's say I
23 have a 70-year-old person who's deemed eligible
24 for SSI because of his income but then certain
25 months in the year makes over a million dollars

1 a month. I know that's unlikely, but let's just
2 suppose it.

3 Is he entitled to benefits for the
4 full year?

5 MS. SHERRY: I would -- I -- I would
6 say he probably doesn't meet the resource qual-
7 -- so -- so you need to have --

8 JUSTICE GORSUCH: He's not eligible
9 for those months.

10 MS. SHERRY: Well, he's probably not
11 eligible to begin with, but if -- even if we
12 assume he's --

13 JUSTICE GORSUCH: But -- no, but let's
14 -- let's just --

15 MS. SHERRY: -- spending the million
16 dollars --

17 JUSTICE GORSUCH: No, no, let's assume
18 at the beginning of the year --

19 MS. SHERRY: Yeah.

20 JUSTICE GORSUCH: -- for some months,
21 he is indeed entitled to and eligible for
22 benefits and -- and he gets them, but then, in
23 certain months, he makes well in excess of the
24 -- the income threshold.

25 MS. SHERRY: So -- so he --

1 JUSTICE GORSUCH: Is he entitled to
2 benefits under your view for the full year?

3 MS. SHERRY: He -- he is until he's
4 terminated from -- from the program. And I
5 think there's one good explanation for it --

6 JUSTICE GORSUCH: So he's --

7 MS. SHERRY: -- and one reason --

8 JUSTICE GORSUCH: -- entitled to
9 benefits --

10 MS. SHERRY: Yes.

11 JUSTICE GORSUCH: -- even though he's
12 not eligible for them?

13 MS. SHERRY: He's not eligible for the
14 cash payment, and -- and let's just assume he's
15 also not eligible for, you know, Medicaid
16 continuation and -- and vocational rehab. He's
17 still entitled to benefits, and that's because
18 of the concept of conditional entitlement that
19 was at issue in Empire Health as well.

20 Entitlement coexists with limitations
21 on payment. That's what the Court said in
22 Empire Health. And the statutory language the
23 Court relied on for that in Medicare Part A is
24 also present in SSI. And so, if you look at the
25 SSI statute, 1381a, it talks about being

1 eligible for payment or I think it says "paid
2 subject to the provisions of this chapter" and
3 then the comparable language in Medicare Part A.

4 JUSTICE KAGAN: I mean, it seems to me
5 Medicare is quite different from this in that
6 respect. I mean, the -- there were lots of
7 arguments in Empire Health, but one of the main
8 ones was, even if you had reached the cap on
9 hospital care, there were other kinds of care
10 that you could access under Medicare. So you
11 had reached the cap in terms of your hospital
12 stay, but you could get outpatient treatment for
13 some other condition. So the Medicare was not
14 going away.

15 But, here, the only thing that there
16 is, which really is the cash payment, is going
17 away in the months in which the person receives
18 more than the threshold income, isn't that
19 right?

20 MS. SHERRY: So, I -- I mean --

21 JUSTICE KAGAN: There's nothing left?

22 MS. SHERRY: -- again, assuming this
23 person is not eligible for Medicaid continuation
24 and vocational rehab, there's the guarantee, but
25 I -- I think this is where you have to take a

1 step back and look at the purposes of DSH
2 because I think you can come up with this
3 hypothetical example, but I do think it pales in
4 comparison to the real-world categories of
5 low-income individuals who are left out if
6 you're looking at the two on a scale.

7 And even with the \$1 million
8 hypothetical, that person -- you know, DSH is
9 not looking at low income for low income's sake.
10 It's looking at it because it's trying to
11 identify a class of individuals who are less
12 healthy and more costly for the hospital. And
13 so, if that person was low income enough to
14 qualify in the first place, just because he's
15 getting a million dollars in one month is not
16 going to change his health overnight in a way
17 that's going to matter to the hospital's bottom
18 line.

19 CHIEF JUSTICE ROBERTS: Thank you --
20 thank you, counsel.

21 Justice Thomas, anything?

22 Justice Alito?

23 JUSTICE SOTOMAYOR: Assume -- assume
24 that the vocational rehabilitation benefit that
25 you think is a part of Title XVI and the 1382h

1 that you think is a part of it, how about if we
2 disagree that the vocational rehab is a -- is a
3 program run separately from Title XVI? So what
4 are you left with? Are you left only with the
5 argument that this is a -- and it's a powerful
6 argument, I'm not denigrating it -- that this is
7 an insurance program for a year, that you're
8 guaranteed payment at least if your income is
9 low for that year, so if you don't get it one
10 month, you're still going to be getting it the
11 second, third, or fourth? That sounds like a
12 program to me too. But part of your argument
13 that some of my colleagues are focused on is the
14 fact that there are no other benefits for that
15 month.

16 MS. SHERRY: Right. So, if you
17 disagree on the non-cash benefits, then, yes, we
18 are arguing that it is a program -- it's an
19 income insurance program. And you don't need
20 the non-cash benefits to agree with us on that
21 and rule for us on that. I think it's an
22 additional -- it's icing, so to speak.

23 I think you do have to, though -- if
24 you agree that there's non-cash benefits,
25 there's no way to rule for the government

1 because their position rests on it only being
2 about cash. So I don't think we need the
3 non-cash benefits to win.

4 JUSTICE SOTOMAYOR: So why don't you
5 spend a moment on the government's
6 counter-arguments as to why those two provisions
7 are not part -- they're not additional benefits?

8 MS. SHERRY: Sure. So let me start
9 with vocational rehabilitation just because I
10 touched a little bit on Medicaid continuation
11 already. It is a benefit provided under Title
12 -- you know, it's housed in Title XVI. You can
13 look at 1382d, which is in Title XVI. It was 6
14 -- it is 1615 of the Social Security Act, so
15 very much in Title XVI.

16 Secondly, it is funded by Title XVI.
17 The appropriations under 1381 is where the
18 funding comes from. And you qualify it if you
19 are a Title XVI disability beneficiary. And so
20 the person who is in the SSI program is getting
21 reimbursement or the state is getting
22 reimbursement for that benefit because they are
23 covered by -- by Title XVI.

24 So in every which way it's a Title XVI
25 benefit. The government's counter-argument,

1 putting the non-cash issue to the side, is that
2 it shouldn't qualify as under Title XVI
3 essentially because it's also under Title XI and
4 it's also under states. That doesn't hold up
5 because it reads "under" as exclusively under.

6 And yet, in DSH itself, they excluded
7 state supplementation benefits, which are not
8 exclusively under Title XVI. They're provided
9 by states. Yet Congress understood them to be
10 benefits under Title XVI such that they needed
11 to be excluded. And so there's a real
12 inconsistency between those two positions.

13 On Medicaid continuation, almost all
14 of the same arguments, you can find it in 1382h.
15 It is 1619(b), and it is also triggered by
16 eligibility in the SSI program. But, on that
17 one too, you can look throughout Title XVI and
18 see it referred to as a benefit under 1382h.
19 1380 -- 1383j is one place to look. I believe
20 it's also in subsection (k) and subsection (p).

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 Justice Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: I have a couple

1 questions.

2 On Justice Gorsuch's hypothetical
3 about the SSI millionaire, I mean, that's
4 unlikely to happen in the real world, but it
5 could happen. But couldn't it also happen that
6 someone on Medicare has, you know, golden
7 insurance, private insurance that's going to
8 cover them, so they never really need Medicare
9 even though they're in the Medicare program?

10 MS. SHERRY: Yes. And I -- I suspect
11 that's -- that's somewhat more -- more likely
12 than the million-dollar --

13 JUSTICE KAVANAUGH: It -- it is more
14 likely why? Why is -- I think it is more
15 likely. Why is that more likely?

16 MS. SHERRY: Well, because everyone is
17 entitled to Medicare when they -- when they turn
18 65. And some who have turned 65 are -- are
19 quite well off and they have amazing insurance.
20 And so I -- I think the million-dollar
21 hypothetical is a hypothetical for -- for a
22 reason.

23 The reality is the individuals who do
24 not get payments in certain months because of
25 excess income are probably not the millionaire

1 or the lottery winner or any of those other
2 hypotheticals you can come up with but, instead,
3 are individuals who slightly pop over the income
4 threshold by a small amount in a month, only to
5 fall back under it the following month.

6 And that's the reason why there are so
7 few that are terminated from the program,
8 because they can't string together 12 months of
9 income stability.

10 JUSTICE KAVANAUGH: So, for people who
11 do pop over for a month, over the limit, most of
12 them stay in the program because they're back
13 under the limit at some point, is that
14 correct --

15 MS. SHERRY: That's correct.

16 JUSTICE KAVANAUGH: --
17 percentage-wise?

18 MS. SHERRY: That's correct.

19 JUSTICE KAVANAUGH: A large percentage
20 of them, right?

21 MS. SHERRY: Yes, a very significant
22 percentage.

23 JUSTICE KAVANAUGH: Then, on Medicare
24 as well, it was going away. I -- I mean, I
25 might have a different understanding -- in fact,

1 it's almost certain I have a different
2 understanding of Empire than Justice Kagan does,
3 but --

4 (Laughter.)

5 JUSTICE KAVANAUGH: -- I thought -- I
6 thought Medicare was going away for that day if
7 you had the private insurance, but we
8 nonetheless -- the Court nonetheless said you're
9 still entitled to Medicare even though you
10 didn't have any Medicare coverage for that day.

11 Is that --

12 MS. SHERRY: That's right. And I
13 think, you know, there's a couple different
14 things that come in there, but I think that's
15 where the conditional entitlement comes in.
16 It's the season ticket holder example from the
17 Empire Health briefing.

18 JUSTICE KAVANAUGH: Okay. And then
19 last question. This is very technical, but what
20 happens in the real world may affect how
21 plausible it is that Congress would have chosen
22 one interpretation over another.

23 So, if you lose, what's going to
24 happen, realistically, to rural hospitals and
25 urban hospitals that serve safety net -- as

1 safety nets?

2 MS. SHERRY: Yeah. So, here, I would
3 point to the amicus briefs, which -- which go
4 through it in some detail. The reason Congress
5 created the DSH adjustment to begin with was
6 because of the higher cost of treating a
7 low-income population, and hospitals that treat
8 a disproportionate share need this money in
9 order to stay afloat for -- for many hospitals.

10 And for others, the point is to
11 provide -- to incentivize them to provide the
12 services that are needed to service this
13 vulnerable and at-risk population, and without a
14 proper reimbursement under the formula, that's
15 going to be very difficult and has been very
16 difficult for hospitals to do.

17 JUSTICE KAVANAUGH: And hospitals will
18 close, or do you think that's not realistic?

19 MS. SHERRY: No, I think that is --

20 JUSTICE KAVANAUGH: An amicus brief
21 suggests rural hospitals are going to close.

22 MS. SHERRY: I -- I think that is
23 realistic. I mean, the amicus briefs go in some
24 detail about how close the margins are and how
25 difficult it is and how significant the -- the

1 DSH adjustment and the particular amount of the
2 DSH adjustment is not only to DSH but to other
3 programs that piggyback off of eligibility for
4 DSH.

5 JUSTICE KAVANAUGH: Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: Yes.

10 Justice Kagan asked you how close is
11 this to Medicare given the way the DSH statute
12 is constructed, and I guess I'm a little
13 concerned that how close it is or how much it
14 looks like or how much it operates like is
15 really beside the point.

16 So, if we set aside Medicare for a
17 second and we just look at this program, and if
18 we assume, as Justice Kagan does, that this is
19 just about the cash payment, I am wondering
20 about the distinction that you're drawing
21 between eligibility for the program, which we
22 can call entitlement, versus eligibility for the
23 payment.

24 As I understood it, eligibility for
25 the program, or entitlement, gives you the

1 assurance that in any month during the next year
2 when you fall below the income cap, the
3 government will send you a check.

4 So that's what's left. Even in a
5 month where you don't get a check, you know that
6 maybe next month you will if you don't have this
7 extra cash coming in.

8 Am I right about that?

9 MS. SHERRY: That's absolutely right.
10 And for more than a year. You have that
11 assurance for so long as you haven't been able
12 to string together 12 consecutive months of
13 higher income.

14 JUSTICE JACKSON: And you also have
15 the government working for you in that effort,
16 right? So, when you apply, you apply to this
17 program, and you have to meet the eligibility
18 criteria.

19 I'm looking at the statute, and it
20 gives the criteria of you being aged or blind or
21 disabled. Do you have a certain income? Do you
22 have certain resources? And the statute says:
23 Shall be an eligible individual for the purposes
24 of this subchapter.

25 Setting aside all the other benefits,

1 if I'm just focusing on the cash benefit, I
2 would think one of the things that comes with
3 that is the government, every month, is
4 monitoring your finances, and in any month in
5 which you go below the payment, they will send
6 you a check automatically. Is that right?

7 MS. SHERRY: I think that's right in
8 part. And the government can correct me if I'm
9 wrong. I think, when you fall below it, you
10 might have to make a phone call and request
11 reinstatement. That's a regulatory requirement.
12 It's not in the statute itself. But --

13 JUSTICE JACKSON: But you're entitled
14 to do that?

15 MS. SHERRY: Absolutely.

16 JUSTICE JACKSON: You know, X person
17 on the street who's not enrolled in the program
18 can't just ask the government for money. You
19 get to do that because you are an entitled
20 person and you met those original criteria,
21 right?

22 MS. SHERRY: Exactly. And that is the
23 real difference, right, the -- the person on the
24 street, right? This is not a case where every
25 month you're just walking up to a window,

1 filling out a form, and then walking away with a
2 check. Once you're in the program, you're in
3 the program.

4 JUSTICE JACKSON: And you get the
5 benefit of picking up the phone and calling the
6 government and saying: Please send me my
7 check -- or the government does it
8 automatically -- in any month in which you are
9 entitled to -- to get it, right?

10 MS. SHERRY: Right. And you authorize
11 the government to have access to your financial
12 records for so long as you're in the program so
13 they can continue to check your income against
14 the guaranteed monthly income.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. McDowell.

19 ORAL ARGUMENT OF EPHRAIM McDOWELL

20 ON BEHALF OF THE RESPONDENT

21 MR. McDOWELL: Thank you, Mr. Chief
22 Justice, and may it please the Court:

23 The DSH provision is designed to
24 compensate hospitals for serving a
25 disproportionate share of low-income patients.

1 And in the Medicare fraction, Congress used a
2 patient's entitlement to SSI benefits as a proxy
3 for determining whether the patient is low
4 income.

5 SSI benefits are monthly cash payments
6 made by SSA when a person meets eligibility
7 requirements in a particular month, including
8 the requirement of having low income in that
9 month.

10 Thus, as HHS has consistently
11 recognized since Congress enacted the Medicare
12 fraction, a person is entitled to SSI benefits
13 only when he satisfies the requirements for a
14 cash payment during the month of his hospital
15 stay.

16 That interpretation is fully
17 consistent with the one this Court upheld in
18 Empire Health. The Medicare fraction uses two
19 distinct phrases, "entitled to benefits under
20 Medicare Part A" and "entitled to SSI benefits
21 under Title XVI."

22 And while the word "entitled" means
23 the same thing within both phrases, benefits
24 under Medicare Part A are fundamentally distinct
25 from SSI benefits under Title XVI.

1 Petitioners claim that a person is
2 entitled to SSI benefits even if he is not owed
3 a cash payment during the month of his hospital
4 stay so long as he received at least a single
5 cash payment sometime within the year prior to
6 his hospital stay.

7 But SSI benefits are monthly cash
8 payments. So, if a person is not entitled to
9 the cash payment in a particular month, he's
10 simply not entitled to SSI benefits in that
11 month.

12 Petitioners also claim that SSI
13 benefits under Title XVI include not only cash
14 payments but also certain non-cash benefits.
15 But those non-cash benefits are not supplemental
16 security income benefits because they are not
17 cash payments made by SSA, nor are they provided
18 under Title XVI.

19 Ultimately, Petitioners would
20 routinely count patients as low income even
21 though they are earning too much income to be
22 entitled to an SSI benefit. That approach is
23 flatly inconsistent with Congress's choice of
24 SSI entitlement as the proxy for low-income
25 status.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Petitioner argues
3 that the whole purpose of this formula is to
4 determine low-income population that is served,
5 which is a good point. So the -- and that
6 enrollment in the SSI program is only for people
7 who are low income, even though people may fall
8 in and out of the -- the monthly payment
9 requirement.

10 Why isn't she right -- why isn't
11 Petitioner right?

12 MR. McDOWELL: So, Justice Thomas, I
13 think our position --

14 JUSTICE THOMAS: I understand the
15 statutory argument.

16 MR. McDOWELL: Yeah.

17 JUSTICE THOMAS: So what difference
18 does it make in a practical sense if your
19 reading is accepted or her reading is accepted?

20 MR. McDOWELL: Right. So I think ours
21 gets to the purpose of the DSH provision better
22 because ours is more precise at capturing
23 low-income people in the month of their
24 hospitalization. We're only going to count
25 someone as low income if they've established

1 that they are low income in the month of their
2 hospitalization.

3 JUSTICE JACKSON: But why does that
4 matter? I -- I -- I'm so confused by your
5 argument, I have to say. I'm struggling to
6 understand why an individual's eligibility for
7 payment in a particular month has any bearing on
8 the goals of compensating hospitals for the
9 higher cost of low-income people.

10 So let me give you a hypothetical.
11 Imagine a man who's lived well below the poverty
12 line for his entire life. He has a range of
13 health conditions that result from that kind of
14 upbringing. When he turns 65 in January, he
15 applies for SSI payments and starts receiving
16 them in February pursuant to the statute and the
17 regulations. Let's say in June he comes into a
18 bit of cash. He inherits some jewelry. He
19 sells it. He picks up an extra shift at work.
20 He gets money back from a friend who owes it to
21 him, okay?

22 We can all agree that if the extra
23 cash he gets in June brings him above the
24 threshold, he doesn't get a cash payment that
25 month because now he's above the threshold. But

1 the Medicare fraction, I thought, was not about
2 how much cash a patient had in any particular
3 month. It's about how costly it would be to
4 treat this person. And I don't understand why
5 it is less or more costly in June, when he has
6 the heart attack, than in May, when he didn't --

7 MR. McDOWELL: Your Honor --

8 JUSTICE JACKSON: -- when he doesn't
9 get the cash payment.

10 MR. McDOWELL: So, Your Honor, I think
11 that understanding of the statute rests on an
12 erroneous premise in Petitioners' argument,
13 which is their misreading of subsection (a),
14 which is entitled "Eligible Individual Under
15 1382." They think that means you look back to
16 the person's income over the last calendar year
17 in the application to see has this person been
18 poor for the last calendar year.

19 If that were how the statute worked, I
20 would agree with you that --

21 JUSTICE JACKSON: But why isn't that
22 the part of the statute that DSH is referring
23 to? I mean, it's clear that that part of the
24 statute says this person, the person for the
25 year, shall be eligible under SSI. That's in

1 the statute.

2 So what I'm asking is, doesn't it make
3 more sense that the DSH program, which is trying
4 to capture people who are low income in this
5 general sense because they will have more
6 serious and more difficult to treat, costly to
7 treat, health issues, why isn't it referring to
8 (a)?

9 MR. McDOWELL: And what I -- what I'm
10 saying is (a) -- they are misreading (a). That
11 is not how (a) works.

12 JUSTICE JACKSON: Okay. So let me --
13 I thought the choice was between (a) and (b).
14 You say the DSH program is referencing (b),
15 which is -- or, sorry, (c), excuse me, which is
16 the provision that says you get a payment in a
17 particular month. And my question to you is,
18 why would Congress care about whether you're
19 getting a payment in a particular month as the
20 marker of whether you are low income and it's
21 more costly?

22 MR. McDOWELL: Because that is the
23 entirety of the SSI statute. (a) does not work
24 the way that Your Honor is posting. (a) is
25 establishing the income limit for SSI

1 eligibility. It's phrased in terms of a
2 calendar rate, but it is set monthly according
3 to subsection (c)(1).

4 And just to give you -- just to
5 explain why textually that has to be right,
6 Section 1382b is about --

7 JUSTICE JACKSON: I'm not asking you a
8 textual argument. I'm ask -- I'm just asking
9 you a purpose. You -- your argument seems to
10 result in people who get cash payments who have
11 the exact same income level as someone who
12 didn't get a cash payment, one is counted and
13 one is not. And what I'm asking you is, why
14 would Congress have set up the DSH program to
15 make that distinction?

16 MR. McDOWELL: Because Congress picked
17 up the SSI entitlement proxy as an off-the-rack
18 proxy. It was a preexisting metric. It existed
19 in 19 -- since 1972. Congress was acting in
20 1986. It just picked up this indirect proxy
21 measure. It doesn't have to be perfect a
22 hundred percent of the time. Theirs is not
23 perfect a hundred percent of the time either, as
24 Justice Gorsuch's hypothetical shows.

25 And my point is that ours is more

1 precise at capturing low-income people because
2 we are looking to whether they establish
3 low-income status and --

4 JUSTICE SOTOMAYOR: So let's talk to
5 that, okay, whether it is more precise. Let me
6 give you the hypotheticals. Someone's eligible,
7 joins SSI in January, is hospitalized in
8 January, but they receive no cash payment in
9 January. They're going to get it on February 1
10 because they just joined the program.

11 Are you including those people?

12 MR. McDOWELL: So, if they just
13 joined, under the statute, those would not --
14 those people would not be entitled to benefits
15 in the first month. And I think that --

16 JUSTICE SOTOMAYOR: Even though they
17 are eligible because their -- they didn't make
18 more money? They should be. It's only they
19 happen to join the program the month they got
20 sick?

21 MR. McDOWELL: Your Honor, they're not
22 eligible. That's an eligibility criteria. It
23 says you're not eligible for payment until the
24 second month after your application, and it's
25 basically --

1 JUSTICE SOTOMAYOR: All right. So
2 it's not capturing people with low income even.

3 MR. McDOWELL: So --

4 JUSTICE SOTOMAYOR: So your -- you
5 made a statement. We now have a group of people
6 that are not captured at all.

7 Then you have the second hypothetical,
8 which is that her income was high in January, so
9 on February 1, her income has gone back down,
10 but she's not going to get a payment because, on
11 -- in January, her income was high.

12 MR. McDOWELL: That's -- that's not
13 correct, Your Honor.

14 JUSTICE SOTOMAYOR: Oh.

15 MR. McDOWELL: That is based on a
16 misreading of (c)(1) and (c)(2) of -- of
17 Section 1382. So Section (c)(2) would apply in
18 the situation where someone is transitioning
19 from ineligibility in a month to eligibility in
20 the month. And what (c)(2) says is that in your
21 first month back into eligibility, you look at
22 your income in that month to determine whether
23 the person is entitled to benefits.

24 JUSTICE SOTOMAYOR: But she still
25 didn't get a check.

1 MR. McDOWELL: She would get a check,
2 is what I'm saying.

3 JUSTICE SOTOMAYOR: But when -- when
4 is she going to see it? She's not going to see
5 it on February 1.

6 MR. McDOWELL: She would see it in
7 February -- she would get it -- she would get
8 the check for purposes of February.

9 And our rule does not turn on whether
10 she actually receives the payment. Our rule is
11 not an actual receipt rule. We've explained
12 that extensively in the 2010 regulation. We do
13 not apply an actual receipt test. We look to
14 whether someone satisfies the statutory
15 requirements for a cash payment during the
16 relevant month in question. Whether they
17 actually receive a check is irrelevant.

18 JUSTICE BARRETT: I'm -- I'm confused
19 about that, actually, because I was asking your
20 friend on the other side these questions about,
21 well, if there was some snafu because it bounced
22 because of an address or something like that,
23 whether they were challenging those codes, and
24 she said no.

25 But why isn't that an actual receipt

1 rule if those people are excluded?

2 MR. McDOWELL: They're -- so the way
3 that works is, if they provide an address later
4 in a -- in a subsequent month, we will go back
5 and retroactively reinstate benefits for the
6 prior month, and then that retroactive
7 reinstatement will be counted for purposes of
8 the numerator. So those -- those people will be
9 reflected in the numerator because, when -- once
10 they provide the address, we will go back and --

11 JUSTICE BARRETT: Retroactively? So
12 then the hospital gets the benefit of the
13 different DSH fraction later?

14 MR. McDOWELL: Exactly, because our
15 data set goes 15 months beyond the end of the
16 fiscal year precisely so that we can capture
17 those retroactive benefits reinstatements once
18 suspensions are lifted for administrative
19 reasons. That's, again, in the 2010 rule. We
20 discuss it towards the end of our brief.

21 JUSTICE KAVANAUGH: Can I ask about
22 the similarities --

23 MR. McDOWELL: Yeah.

24 JUSTICE KAVANAUGH: -- and differences
25 with the Medicare? So, as you're exploring

1 these answers, you can bounce in and out of
2 actually receiving social -- I mean SSI
3 payments. You're in the program, they say, for
4 a year, but you might not receive payments in a
5 particular month. Right so far?

6 Medicare, the argument on the other
7 side is similar in the sense that you're in the
8 program, you qualified for Medicare, but you
9 might have private insurance. Lots of people
10 do. And, therefore, any particular hospital
11 stay in a given day, week, month might be paid
12 for by your private insurance, not by Medicare.
13 So, even though you're not getting Medicare
14 payments, Medicare is paying zero, that, we said
15 in Empire, is still going to be counted because
16 you're in the program.

17 So what's the difference between those
18 two things?

19 MR. McDOWELL: The difference goes to
20 the structure of the statute. So, with Medicare
21 Part A, there is a threshold eligibility
22 determination, which is whether you're over 65
23 or have received disability benefits for 25
24 months. Once you get that, through that
25 threshold step, you're into the program and you

1 are entitled to a broad array of benefits. It's
2 not just the in-patient hospital care coverage.
3 It's post-hospital care, hospice care, home
4 healthcare. And --

5 JUSTICE KAVANAUGH: But how is that
6 relevant to the question here, which is --

7 MR. McDOWELL: Right.

8 JUSTICE KAVANAUGH: -- I thought,
9 looking at payment?

10 MR. McDOWELL: Right. So -- and that
11 -- that gets to the second layer of
12 determinations under Medicare Part A. Each of
13 those benefits has different payment
14 limitations. So that -- that's what was at
15 issue in Empire Health essentially.

16 JUSTICE KAVANAUGH: Mm-hmm.

17 MR. McDOWELL: Here, there's only one
18 determination. It's all about month-to-month
19 payment determination. There's no threshold
20 program eligibility determination because that's
21 not what subsection (a) does.

22 Subsection (a) just establishes an
23 income limit for SSI eligibility that is applied
24 on a month-to-month basis under (c)(1).
25 Subsection (a) is not its own threshold --

1 JUSTICE KAVANAUGH: But it seems to me
2 -- I don't mean to press too hard, but it seems
3 to me you're suggesting that there are multiple
4 reasons Medicare might not pay maybe, and
5 there's only one reason that SSI might not pay?
6 Is that what you're suggesting?

7 MR. McDOWELL: What I'm trying to say
8 is that their argument is that this is different
9 because -- or it's the same because they're both
10 programs. And it's -- our -- our point is that
11 this is not a program the same --

12 JUSTICE KAVANAUGH: They're both
13 programs in which you could be receiving payment
14 in a relevant period but not for the precise
15 period that you're in the hospital?

16 MR. McDOWELL: Right. And the
17 difference is the structure of the benefits
18 statutes. So SSI is all about month-to-month
19 payments. There is no threshold --

20 JUSTICE KAVANAUGH: But you can't
21 be -- am I right that you can't be terminated
22 from the program until, for a period of 12
23 consecutive months, your income has not exceeded
24 -- or maybe 11 --

25 MR. McDOWELL: That's not how,

1 actually, it works at least in -- in practice.

2 So the way that that works is we
3 terminate someone's name from the administrative
4 database, but we don't consider them part of a
5 broader program in the same sense as Medicare
6 Part A. So, basically --

7 JUSTICE KAVANAUGH: When do you
8 terminate them from the database?

9 MR. McDOWELL: After 12 months of
10 ineligibility. And I actually think that's
11 extremely important --

12 JUSTICE KAVANAUGH: But they're in the
13 database. So let's say you drop out -- I'm
14 sorry to prolong it, but it's important to me at
15 least. You drop out for a month. The next
16 month -- because your income's gone above the
17 limit. The next month, your income is below the
18 limit. Do you have to do anything to receive
19 the benefits in that next month?

20 MR. McDOWELL: You don't need to do
21 anything -- well, you would have had to tell
22 them when -- when you go from eligibility to
23 ineligibility. You're supposed to report
24 changes in your status so that they know.

25 JUSTICE KAVANAUGH: That's not the

1 question.

2 MR. McDOWELL: Right. The --

3 JUSTICE KAVANAUGH: The question's:

4 In the next month --

5 MR. McDOWELL: Right.

6 JUSTICE KAVANAUGH: -- when your
7 income goes below the limit, do you have to do
8 anything to receive the benefits in the next
9 month? I think your answer was no.

10 MR. McDOWELL: If -- so, if you're
11 transitioning from eligibility to ineligibility
12 or vice versa, you do have to report those
13 changes to SSA.

14 I -- what I was going to say --

15 JUSTICE JACKSON: But you don't have
16 to reapply, right? I think that's Justice
17 Kavanaugh's question.

18 MR. McDOWELL: Right. And -- and my
19 point --

20 JUSTICE KAGAN: Mr. McDowell -- go
21 ahead. I'm sorry.

22 JUSTICE KAVANAUGH: Well, I'm not
23 done. I'm not done.

24 MR. McDOWELL: Okay. My point about
25 the application is that the application is

1 actually just a monthly application. In the
2 application, they are just looking at your
3 income in that month. It's essentially the same
4 thing as the later determinations; it's just in
5 a form as opposed to done more seamlessly.

6 But the actual substantive criteria --
7 if you look at the application, they are asking:
8 Are you low income in the month of your
9 application and in subsequent months, while your
10 application might be pending? There's no
11 question on the application that goes back and
12 says: Have you been low income for the last
13 year?

14 JUSTICE KAGAN: If I could understand
15 this, you know, because these -- these are
16 really important questions.

17 What you're saying is that in
18 Medicare, we were looking at a program where,
19 even if you had reached the cap for hospital
20 care, there were many other kinds of medical
21 care that one could access the insurance program
22 for. You could access it for home health. You
23 could access it for outpatient treatment. You
24 could keep getting stuff from Medicare even
25 though you had reached the cap on hospital care,

1 is that correct?

2 MR. McDOWELL: That's exactly right.

3 JUSTICE KAGAN: And we all know that
4 health insurance works that way because we reach
5 the cap on one thing and we keep on benefitting
6 from our insurance on another thing, right?

7 That's just the way insurance --

8 MR. McDOWELL: Exactly, yes.

9 JUSTICE KAGAN: -- health insurance
10 works.

11 But you're saying that, here, there's
12 only this cash stream.

13 MR. McDOWELL: Correct.

14 JUSTICE KAGAN: There's only the
15 monthly payments that one is getting.

16 MR. McDOWELL: That's right.

17 JUSTICE KAGAN: Then the question is:
18 Okay, well, what about these references to the
19 annual -- you know, what -- what about these
20 annual measures? Aren't you sort of in the
21 program for a year even though you're not
22 getting payment for particular months? Right?

23 MR. McDOWELL: Yes.

24 JUSTICE KAGAN: And -- and there are
25 those references in the statute. What are they

1 there for?

2 MR. McDOWELL: So they are in
3 Section 1383, which is captioned "Procedures for
4 Payments." They are administrative housekeeping
5 provisions. One says you are in SSA's
6 administrative database for a year, until
7 you're -- you've been ineligible for 12 straight
8 months.

9 That provision was added 14 years
10 after the statute was enacted. It was added in
11 1986. And it was simply meant to codify SSA's
12 existing administrative practice of removing
13 people from the database. It wasn't meant to
14 change the fundamental scope of the entitlement
15 under Section 1382.

16 JUSTICE KAGAN: And the fact that you
17 don't have to apply -- I mean, this is a very --
18 reapply for, you know, 12 months' time, this is
19 a pretty sensible provision from everybody's
20 perspective, right?

21 MR. McDOWELL: Yes.

22 JUSTICE KAGAN: Because the --
23 Congress knew that people were going to come in
24 and out. Some months they were going to be
25 above the threshold. Some months they were

1 going to be below the threshold. So some months
2 they were going to get monthly benefits and some
3 months they weren't.

4 But to have everybody reapplying every
5 month as that happened didn't make sense for
6 anybody. It didn't make sense for the people
7 who were giving the benefits, and it didn't make
8 sense for the people who were receiving the
9 benefits.

10 MR. McDOWELL: That's exactly right.

11 And I just -- just to focus on
12 Section (j)(1) of 1383, I think this is an
13 important textual point. It refers to those 12
14 months as months of ineligibility.

15 So, under Petitioners' view, a person
16 is both eligible for the program, eligible for
17 benefits, and ineligible for benefits in the
18 same month.

19 JUSTICE GORSUCH: Well --

20 MR. McDOWELL: And I think that's not
21 a coherent reading of this statute.

22 JUSTICE GORSUCH: -- may I pursue that
23 just a little bit?

24 MR. McDOWELL: Yeah.

25 JUSTICE GORSUCH: You mentioned 1383.

1 And one of the provisions in 1383, Mr. McDowell,
2 concerns the ability of SSA to secure financial
3 records, and it says that it continues "until
4 the cessation of the recipient's eligibility of
5 benefits."

6 Doesn't that suggest that eligibility
7 for benefits doesn't fluctuate from month to
8 month? Because, otherwise, SSA, I suppose,
9 wouldn't be able to access a recipient's records
10 for the months in which his income goes above
11 the threshold.

12 MR. McDOWELL: So that is the only
13 term --

14 JUSTICE GORSUCH: I -- I -- I know.
15 That's why I'm picking --

16 MR. McDOWELL: -- it's the only
17 reference in the statute.

18 JUSTICE GORSUCH: -- I'm picking the
19 hardest one for you.

20 MR. McDOWELL: And -- and -- and what
21 SSA has said is that we're going to read this in
22 a beneficiary-friendly way. We're going to look
23 to -- we're going to say beneficiaries only have
24 to re-authorize -- or authorize at the outset
25 because, if they had to reauthorize every single

1 month, they would lose benefits if they forgot
2 to reauthorize in a particular month.

3 It's an application essentially of
4 utility error, which is -- which says that
5 the -- the canon of consistent usage will yield
6 where the result would be unworkable. That's
7 what SSA has said as to this particular
8 provision. But everywhere else in the statute,
9 it reads "eligibility" to be month-to-month
10 payment eligibility.

11 JUSTICE GORSUCH: But, here, it
12 doesn't mean that. It means the 12 months.

13 MR. McDOWELL: Only because the result
14 would be unworkable and bad for everybody,
15 including beneficiaries, so it has taken that
16 one isolated interpretation out.

17 JUSTICE GORSUCH: Just two more quick
18 questions.

19 One, the D.C. Circuit, in places,
20 seemed to adopt an actual receipt rule, which
21 you have disavowed. Would an affirm, in your
22 view, be the appropriate -- that's what your
23 brief asks us to do, is affirm. Is that the
24 appropriate remedy given some of the language in
25 the D.C. Circuit opinion talking about actual

1 receipt?

2 MR. McDOWELL: Your Honor, in the
3 relevant portion of the opinion analyzing the
4 question presented here, the D.C. Circuit says:
5 HHS reads the provision to cover only Medicare
6 beneficiaries who are entitled to SSI cash
7 payments at the time of their hospitalization.

8 That's at Pet. App. 9. That's exactly
9 our position. Judge Katsas absolutely
10 understood our position, went through the
11 arguments, and adopted the correct reading. He
12 did not think that we were applying an actual
13 receipt rule.

14 JUSTICE GORSUCH: Right. And then if
15 you could address the concern that some of the
16 amici have raised about what this would mean to
17 rural and urban hospitals.

18 MR. McDOWELL: Yes. So we -- we
19 understand the DSH payments are critical to
20 hospitals. And we provide billions of dollars
21 in DSH payments each year. In 2024, it was
22 approximately 9.2 billion for hospitals under
23 this program, under DSH.

24 And what the Court said, though, in
25 Empire Health is that the point of the DSH

1 provision is not to provide the most money
2 possible to hospitals. It's to compensate
3 hospitals for serving a disproportionate share
4 of low-income patients.

5 And we don't think that the statute
6 authorizes us to provide any more DSH payments.
7 We think that the statutory text unambiguously
8 prevents us from putting out more DSH payments
9 under this provision.

10 JUSTICE JACKSON: Can you help me to
11 understand why you think that there aren't
12 threshold eligibility criteria in this statute?

13 MR. McDOWELL: Yes.

14 JUSTICE JACKSON: You pointed to 1383.
15 But what about 1381a and 1382a, both of which
16 seem to be pointing to age, blindness, and
17 disability as threshold criteria, in addition to
18 income? And if that's the case, I'm wondering
19 why those aren't the kinds of things that one --
20 the government assesses at the outcome to
21 determine your eligibility for the program, and
22 then they may do the monthly assessment of
23 income pursuant to the rest of the statute.

24 MR. McDOWELL: We assess those things
25 at the outset, but we also reassess them every

1 month. It just so happens that someone can't
2 age backwards. So, of course, we don't go back
3 and --

4 JUSTICE JACKSON: Right. But what
5 about disability? Each application -- every
6 monthly application, when you call up and you
7 say, please give me the check, I've fallen out
8 one month, do -- do they reassess your
9 disability status?

10 MR. McDOWELL: The statute gives SSA
11 discretion to determine when to make these
12 reevaluations.

13 JUSTICE JACKSON: No, no, no, I'm not
14 asking discretion. I'm asking: What does the
15 government do?

16 MR. McDOWELL: In --

17 JUSTICE JACKSON: Because it seems to
18 me that if the government does not reassess the
19 threshold criteria of disability, then you're in
20 the program based on the government's initial
21 disability determination, correct?

22 MR. McDOWELL: I disagree, Your Honor,
23 because we don't reassess disability every
24 single month. We do do periodic reassessments.
25 But, still, the entitlement is a month-to-month

1 entitlement because the entitlement is not based
2 solely on --

3 JUSTICE JACKSON: No, I understand the
4 payment is made on a month-to-month basis, but
5 you make the payment only to the category of
6 people who also meet age and disability criteria
7 that you assess only at the beginning.

8 MR. McDOWELL: But --

9 JUSTICE JACKSON: So what I'm asking
10 you is: Isn't that initial assessment the same
11 kind of thing as the threshold determination
12 that happens in most benefit programs, and then
13 you're in the program and then the monthly
14 assessment occurs to give you the benefit or
15 not?

16 MR. McDOWELL: No, Your Honor,
17 because, with respect to Medicare Part A, you
18 get into the program by being 65. Then you're
19 in, and you get access to all of the benefits
20 from the threshold.

21 Here, just because you're disabled in
22 the first month does not mean that you are into
23 a program. You still have to show every single
24 month that your income is below the income
25 limit. And just to point to Section 1381a,

1 that -- that text refers to a determination of
2 eligibility on the basis of income and
3 resources.

4 JUSTICE JACKSON: Yes, and then 82t --

5 MR. McDOWELL: That is a monthly --

6 JUSTICE JACKSON: -- excuse me, then
7 1382a is set up to look at the income and
8 resources, and then it says, "shall be an
9 eligible individual."

10 It seems to me very clear that the
11 statute is set up to make a threshold
12 determination of who is eligible on the basis of
13 income and resources given those provisions that
14 I just outlined.

15 MR. McDOWELL: Your Honor, I disagree.
16 And just to point you to 3 -- 1382b(1), that
17 also refers to the benefit amount at -- in terms
18 of an annual rate.

19 JUSTICE JACKSON: Yes, but that's in
20 procedure. That's all -- we've already
21 determined --

22 MR. McDOWELL: 1382b -- b --

23 JUSTICE JACKSON: Excuse me.

24 MR. McDOWELL: -- 1382b(1).

25 JUSTICE JACKSON: I see. Sorry.

1 MR. McDOWELL: Yes. So that's at 5A
2 of the statutory appendix to our brief.

3 JUSTICE JACKSON: Yes.

4 MR. McDOWELL: That is talking about a
5 rate of the amount of benefits for the calendar
6 year. And everyone agrees that SSA does not
7 have to pay benefits annually. It has always
8 been converted into a monthly amount. And
9 Petitioners on page 7 of their opening brief
10 concede that that has to be done because
11 subsection (c)(1) requires a monthly payment
12 eligibility determination.

13 (c)(1) is the determination. It's the
14 only determination in the statute. That's the
15 determination that is referenced in 1381a when
16 it talks about determine eligibility on the
17 basis of resources. It points you to (c)(1).

18 And if you look at (c)(1), which is at
19 6A of the appendix to our brief, it says "an
20 individual's eligibility for a benefit" --

21 JUSTICE JACKSON: I'm sorry, how --
22 how can you get to (c)? 1382a -- 1382, (1)
23 says, right, you make a determination of their
24 eligibility on the basis of income and
25 resources. Then, when you get to 1382a, which

1 is the next provision, it says "eligible
2 individual defined," and it is set up to make
3 the determination on the basis of income and
4 resources.

5 MR. McDOWELL: Your Honor, that income
6 metric is converted into a month-to-month limit.

7 JUSTICE JACKSON: No, I understand.

8 MR. McDOWELL: It's -- okay.

9 JUSTICE JACKSON: I understand.

10 MR. McDOWELL: Right. Right. So
11 there's --

12 JUSTICE JACKSON: I'm just saying, but
13 isn't 1382a relevant to the determination of who
14 is an eligible individual?

15 MR. McDOWELL: It is relevant to the
16 income -- to the income criterion, yes, that is
17 relevant. What I'm saying is it's converted
18 into a monthly limit because this whole statute
19 is inherently month to month. It's designed as
20 a month-to-month statute.

21 JUSTICE KAVANAUGH: On the question of
22 insurance, I think in your briefs, a lot of your
23 argument -- maybe not a lot -- but some turned
24 on this is not insurance. And you heard what
25 your friend on the other side said in response

1 to that, that this really functions just like
2 insurance.

3 MR. McDOWELL: Yeah, I would make a
4 few points about that. The first is, as a
5 textual matter, Congress expressly referred to
6 Medicare Part A as insurance. It did that in 42
7 U.S.C. 426 and 42 U.S.C. 1395c. It never called
8 SSI insurance.

9 And I don't think SSI functions like
10 an insurance program in two particular ways.
11 First, insurance, as the Court explained in
12 Empire Health, is -- it's very natural to talk
13 about the entitlement to insurance as being
14 separate and apart from the right to payment
15 because you're still entitled to insurance even
16 if your policy doesn't pay for a particular
17 medical service. Here, everything turns on the
18 right to payment.

19 And then the second difference is
20 that, with SSI, it doesn't insure you against
21 future risks. You can't successfully apply for
22 SSI until you are already low income, whereas,
23 with Medicare Part A, you get in automatically
24 when you're 65 and then it protects you, insures
25 you against any future healthcare expenses

1 thereafter.

2 JUSTICE KAVANAUGH: What about the
3 disability in Medicare?

4 MR. McDOWELL: The disability in
5 Medicare is -- is a little bit different, but
6 the Court in that case relied on the fact that
7 --

8 JUSTICE KAVANAUGH: If you're under 65
9 and disabled, that's -- you apply, right?

10 MR. McDOWELL: That's right. But the
11 Court in -- in Empire Health specifically said
12 that the entitlement to Medicare Part A is
13 automatic. And the reason why it said that is
14 because the vast majority of Medicare
15 beneficiaries are -- are getting it because
16 they're over 65, and so --

17 JUSTICE KAGAN: I think that the --
18 Ms. Sherry's idea for how this is insurance --
19 and she'll correct me if I'm wrong -- but the --
20 the idea is that even if you run over the
21 threshold in a particular month, that you know
22 that you're going to get the benefit in the next
23 month when you go under the threshold, even
24 without a reapplication.

25 So the insurance, which she said

1 really -- isn't really insurance; it's sort of
2 assurance -- is that I have an assurance for a
3 period of a year that I won't have to reapply
4 when I go under the threshold again.

5 So what should we make of that?

6 MR. McDOWELL: So I agree that you
7 don't have to submit a new application, but you
8 will be subject to another determination.
9 You'll have to tell them when you become
10 ineligible. They'll have -- then you'll have to
11 tell them when you think you're going to be
12 eligible again. And they're going to take
13 another look at it. You don't have to submit a
14 paper application again, but there is another
15 determination.

16 In Medicare Part A, there's just the
17 threshold eligibility determination, and then
18 you're in the program and you get access to this
19 wide array of benefits. So it's quite
20 different.

21 JUSTICE KAVANAUGH: On the
22 consequences that Ms. Sherry talked about for
23 the hospitals, are you saying those are -- as a
24 factual matter, you disagree with the predictive
25 judgment in the amicus brief and in the

1 Petitioners'? Or are you saying, yeah,
2 hospitals could close, but that's the nature of
3 a program and the limited resources?

4 MR. McDOWELL: Well, Justice
5 Kavanaugh, it's -- it's not as if -- this has
6 been the longstanding position. This has been
7 the position since 1986. So it's not as if how
8 the Court decides this case is going to
9 necessarily change the status quo if it agrees
10 with us. It just will be maintaining the status
11 quo.

12 So -- and then, as to some of the
13 arguments in the amicus briefs, they point to
14 the 340B drug pricing program as kind of another
15 potential harm here, but they don't -- they --
16 they don't fully explain the fact that hospitals
17 will have -- do have other pathways of getting
18 into that program. It's not just based on the
19 DSH percentage.

20 JUSTICE KAVANAUGH: I think there are
21 three things. You might not qualify for DSH at
22 all. If you do qualify -- because of the
23 cutoff, the 15 percent. If you do qualify, the
24 benefits might be less. And you might not
25 qualify for 340B. Those are the three buckets

1 of things, right?

2 MR. McDOWELL: So I don't disagree as
3 a factual matter that if you don't qualify for
4 the 15 percent, that you're not part of the DSH
5 payment program. But I will say that one thing
6 that is important is that the ACA has already
7 changed the status quo here because it has
8 reduced -- it's diminished the importance of
9 this Medicare fraction formula already because
10 now, for a hospital's DSH payment, 25 percent is
11 based on this formula, where previously it was a
12 hundred percent. And now it's 25 percent. And
13 75 percent is based on the rate of uncompensated
14 care, which is a totally different metric.

15 JUSTICE KAVANAUGH: I think your
16 answer then is their predictive judgment's wrong
17 because this is the way it's been. Is that --

18 MR. McDOWELL: That -- that's
19 essentially correct. And I will say that I --
20 they -- they put out a \$1.5 billion number in
21 their cert petition on page 18. They don't
22 explain how they get to that number. They don't
23 --

24 JUSTICE KAVANAUGH: Well, they say
25 you're not giving them the data to figure it

1 out. So that's --

2 MR. McDOWELL: Well, Your Honor, the
3 D.C. --

4 JUSTICE KAVANAUGH: -- a little rich
5 from their perspective. Yeah.

6 MR. McDOWELL: -- the D.C. Circuit
7 already considered that argument and rejected
8 it, and it's not before the Court. And I -- I'm
9 happy to speak to that data issue. I mean, I
10 think --

11 JUSTICE KAVANAUGH: That's okay.
12 That's probably too in the weeds, yeah.

13 CHIEF JUSTICE ROBERTS: Thank you --
14 thank you, counsel.

15 Justice Thomas?

16 Justice Alito?

17 Justice Gorsuch, anything further?

18 Okay. All right.

19 Justice Jackson?

20 Thank you, counsel.

21 Rebuttal, Ms. Sherry?

22 REBUTTAL ARGUMENT OF MELISSA ARBUS SHERRY

23 ON BEHALF OF THE PETITIONERS

24 MS. SHERRY: Thank you, Your Honor.

25 So starting with the program

1 eligibility issue, Justice Jackson, we agree
2 with your reading of the statute both in terms
3 of 1381a and 1382 subsection (a). It talks
4 about in a calendar year these are eligibility
5 requirements. Disability is not reassessed on a
6 monthly basis. In fact, one of the provisions
7 we point to on page 26 of our brief is one that
8 shows that redetermination can occur annually,
9 every few years, what have you. And so there is
10 this broader concept per statute of program
11 eligibility.

12 What they really are saying is, yeah,
13 okay, but that's not what we do in practice.
14 You know, we -- in practice, we look at it on a
15 month-to-month basis and we ask for only a month
16 of financial information. I actually think the
17 application asks for about 14 months. And I
18 think, per statute, it would be very strange to
19 approve an application for someone who says I
20 have no money in this month because I spent all
21 my money and I'm unemployed, but I just got a
22 new job, and starting next month I'm going to
23 make a million dollars a year. I don't think
24 that person would be SSI-eligible under the
25 terms of the statute.

1 And you can look beyond that. If you
2 look at the charts that we pointed to that are
3 in the Joint Appendix from the court of appeals,
4 what it's measuring is duration of eligibility,
5 meaning from the very beginning when the
6 application is approved to when you're kicked
7 out of the program. That's what the termination
8 numbers are. And so this isn't a concept that
9 we've made up. It's in the statute. It's in
10 their regulations. It's in the statistics that
11 they keep.

12 The second point has to do with
13 insurance. The question here isn't really
14 whether it's called insurance. It's whether it
15 functions like an insurance program in the
16 relevant respect. And it does. And, Justice
17 Kagan, you're right, it's a form of assurance.
18 It's a safety net. It functions in the same
19 way.

20 And the fact that it doesn't take
21 account -- I mean, it's not health insurance,
22 but there's things like unemployment insurance
23 that function in a similar way. It's called
24 insurance. It's different than Medicare, but
25 what matters for DSH purposes is not whether

1 it's "insurance" but whether or not there is
2 something bigger than just the individual
3 monthly check to people on the street. And
4 there is.

5 To that point, it is more than just
6 cash. There are non-cash benefits. And so it's
7 similar to Medicare Part A in that respect too,
8 whereas someone is not entitled to cash payment
9 in a given month. And these are individuals who
10 are disabled, which is about 85 percent of the
11 SSI population. They're entitled to Medicaid
12 continuation, they're entitled to vocational
13 rehabilitation, both in Title XVI.

14 And just to point the Court -- because
15 I think there's some confusion when it comes to
16 Ticket to Work in the briefing. This didn't
17 come about until 1999. But, if you look at that
18 particular statute and you look specifically at
19 subsections (c)(1) and (j)(1)(b), it just takes
20 you right back into Title XVI and right back
21 into 1382d.

22 Fourth point has to do with this time
23 lag issue. I think there is confusion in the
24 brief and, frankly, confusion that we have about
25 how they account for these individuals, whether

1 they're paid in the current month, what that's
2 based on, and whether or not they're counted.

3 I agree with the reading of the
4 statute. If you look at (c)(2) and you look,
5 actually, at the regulations, 416.420, it does
6 seem like those individuals should be getting a
7 check and it seems like they should be counted.
8 It's just not clear whether they are.

9 And we get that from the program's
10 operation manual. If you look at 2005.001, it
11 seems to say: We do this measurement based on
12 months prior, and you may not be
13 payment-eligible in a month because of what you
14 made in a prior month.

15 So it's not clear what's happening on
16 the ground. And I think that goes to the point
17 of the -- our 1.5 billion figure. Notably, they
18 haven't come up with a figure of their own.
19 They're the ones that have this information.
20 They have no counter-number.

21 And we are in a position where we
22 can't look behind the curtain. We don't have
23 access to the data. That's our best estimation
24 of what the delta is. And they don't come up
25 with a contrary number to that, which I think

1 just gets us back to DSH and to the purposes of
2 DSH.

3 They say what you should be counting
4 are individuals who are low income in the
5 hospital month. But they don't address the fact
6 that their interpretation simply does not count
7 those individuals. They don't count the nursing
8 home patient. They don't count the first month,
9 as -- as the answer to the question revealed.
10 They don't count those in prison. They don't
11 count those who violate a parole or probation.
12 And they don't count those in administrative
13 suspension.

14 I think the actual receipt test and
15 where there's confusion is maybe just one of
16 semantics. It's true that if those individuals
17 are no longer suspended when they run the
18 15-month eligibility file, then they'll count
19 them. But, if they still are, then they don't
20 count them.

21 And so there's individuals where they
22 need to have a representative payee accept their
23 check. They're eligible, they're absolutely
24 due, they don't have someone who can accept the
25 check. Those people are not counted, and that's

1 what matters for DSH purposes.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MS. SHERRY: Thank you.

5 CHIEF JUSTICE ROBERTS: The case is
6 submitted.

7 (Whereupon, at 11:16 a.m., the case
8 was submitted.)

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